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From: GARY V PERKO [GARYP@hgslaw.com]
Sent: Thursday, May 26, 2005 3:49 PM
To: Filings@psc.state.fl.us
Subject: Docket No. 041393-EI

Attachments: 041393 PEF Reply to WS Answer to Motion for Offl_Recog.pdf



041393 PEF
ly to WS Answ
Docket No. 041393-EI

Attached for filing on behalf of Progress Energy Florida (PEF) is:
PEF's Reply to White Springs' Answer to PEF's Request for Official Recognition
10 pages
Gary V. Perko
Hopping Green & Sams, P.A.
1-850-425-2359

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FPSC-COMMISSION CLERK

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petition for approval of two unit power sales agreements with Southern Company Services, Inc. for purposes of cost recovery through capacity and fuel cost recovery clauses, by Progress Energy Florida, Inc.

DOCKET NO. 041393-EI

SERVED: May 26, 2005

PROGRESS ENERGY FLORIDA'S REPLY TO WHITE SPRINGS' ANSWER TO REQUEST FOR OFFICIAL RECOGNITION

PROGRESS ENERGY FLORIDA, INC. (PEF), by and through its undersigned counsel, hereby responds to the answer of White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate – White Springs (“White Springs”) to PEF’s Request for Official Recognition:

1. White Springs cannot legitimately contend that the Commission’s recent order approving Florida Power & Light Company’s (FPL’s) Unit Power Sales (UPS) agreements has no bearing on this case. See Order No. PSC-05-0084-FOF-EI (Jan. 24, 2005) (“FPL Order”). The FPL order constitutes agency precedent concerning the Commission’s review of UPS agreements of the type at issue in this proceeding. In the FPL order, the Commission stated that its approval of FPL’s UPS Agreements was “based upon the evidence presented at the hearing and in consideration of the parties’ post-hearing briefs.” Id. at 5 (emphasis added). Because the FPL Order did not recite all of the issues raised in the post-hearing briefs, PEF’s motion seeks official recognition of Mr. Churbuck’s post-hearing brief to elucidate the issues and thereby aid the Commission in interpreting its prior order. See Macnamara v. Kissimmee River Valley, 648 So.2d 155, 164 (Fla. 2d DCA 1994) (“the court takes judicial notice of the Governor’s brief from the Supreme Court records as an aid in interpreting the Martinez decision[.]”).

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2. While the record of this case will differ from the FPL matter, certain issues raised by Whites Springs are substantially similar, if not identical, to those raised in the FPL matter. For example, in its prehearing statement, White Springs argues that “until the results of a system impact study are provided by Southern Company whether PEF’s ratepayers will be asked to bear additional costs associated with the transmission needed to implement the agreements is unknown.” See White Springs Prehearing Statement, at p. 3 (Fact Issue #4) and p. 4 (Fact Issue #6). Churbuck’s Post-Hearing Brief raised this very same issue in the FPL matter. Specifically, Churbuck noted that FPL (like PEF in this case) had not received a System Impact Study from Southern Transmission (Churbuck Post-Hearing Brief, at 3) and that potential transmission upgrade costs were not known. Id. at 5. Nevertheless, the Commission approved the FPL agreements.

3. In its Prehearing Statement, White Springs also argues that the Commission should not approve PEF’s agreements before completion of pending FERC investigations concerning Southern Company’s alleged “market power” and other issues. See White Springs Prehearing Statement, at p. 4 (Question of Law #2). Similarly, Churbuck’s Post-Hearing Brief pointed out FERC’s pending “market power” investigation and argued against approval of FPL’s agreements absent a condition requiring FPL to secure a contract modification to provide for the lower of cost-based or UPS contract pricing if FERC found market power. Churbuck Post-Hearing Brief, at p. 10-11. Nevertheless, the Commission approved the FPL agreements without such a condition. Implicitly, the Commission concluded that the pending FERC investigation did not warrant modification, much less disapproval, of FPL’s agreements.

4. In requesting official recognition of Churbuck’s Posting Hearing brief, PEF simply seeks to aid the Commission in interpreting its precedent in the FPL matter by pointing

out that similar, if not identical, issues were raised in that proceeding. Contrary to White Springs' suggestion, PEF does not contend that the FPL Order is necessarily dispositive on these issues. Although PEF contends that Whites Springs has not presented evidence warranting departure from the FPL precedent; that ultimately is for the Commission to decide. In any event, at the very least, the FPL Order is persuasive authority directly on point.

5. White Springs cites no authority for its apparent claim that the simple fact that a party opposes a request for official recognition requires denial. See Answer, at p.5. This would essentially render Section 90.202(6), Florida Statutes, meaningless by depriving the courts and administrative tribunals the discretion to take judicial notice (or official recognition) of public records of the state.

6. Likewise, White Springs cites no authority for its bald claim that granting PEF's Request would somehow result in a "fundamental violation of White Springs' due process rights." Answer, at p.7. Although White Springs was not a party to the docket in which the FPL agreements were addressed, as indicated in its response to PEF's Interrogatories, White Springs was, at the time, a member of the Florida Industrial Power Users Group (FIPUG), which was a party to the proceeding and, in fact, opposed approval of the FPL agreements. See White Springs's Answer to PEF Interrogatory No. 2 (Exhibit "A"); FPL Order, at p. 5 (noting that FIPUG and others contended that FPL had not submitted sufficient evidence to justify approval of the agreements). In any event, like PEF, White Springs has ready access to public records of the Commission, including those related to the FPL matter. Its claim of prejudice is baseless.

WHEREFORE, Progress Energy Florida, Inc., respectfully requests official recognition of Thomas K Churbuck's Post-Hearing Statement of Issues and Positions, Brief, and Proposed

Findings of Fact and Conclusions of Law ("Churbuck's Post-Hearing Brief) on Issue No. 14C in
Docket No. 040001-EI.

RESPECTFULLY SUBMITTED this 26th day of May, 2005.

//s// Gary V. Perko

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CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of Progress Energy Florida's (PEF's) Reply to White Springs' Answer to PEF's Request for Official Recognition have been provided by e-mail and by U.S. Mail, postage pre-paid, to the following this 26th day of May, 2005:

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//s//Gary V. Perko

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EXHIBIT "A"

**BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION**

In re: Petition for approval of two unit power sales agreements with Southern Company Services, Inc. for purposes of cost recovery through capacity and fuel cost recovery clauses, by Progress Energy Florida, Inc.

Docket No. 041393-EI

Served: May 19, 2005

**RESPONSES OF
WHITE SPRINGS AGRICULTURAL CHEMICALS, INC.
D/B/A PCS PHOSPHATE – WHITE SPRINGS
TO FIRST SET OF INTERROGATORIES (NOS. 1 – 2)
OF PROGRESS ENERGY FLORIDA, INC.**

Pursuant to Rule 28-106.206, Florida Administrative Code, Rule 1.340 of the Florida Rules of Civil Procedure, and the Prehearing Officer's April 20, 2005 "Order Establishing Procedure" in this proceeding (Order No. PSC-05-0432-PCO-EI) ("April 20 Order"), White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate – White Springs ("White Springs") hereby serves its Responses to the First Set of Interrogatories (Nos. 1 – 2) of Progress Energy Florida, Inc. ("PEF").

White Springs interposes the following general and specific objections to these Interrogatories and, without waiving such objections, provides the following answers to PEF Interrogatories Nos. 1 and 2.

Sincerely,

/s/ Daniel E. Frank

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*Attorneys for
White Springs Agricultural Chemicals, Inc.
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May 19, 2005

Progress Energy Florida, Inc.
Docket No. 041393-EI

**Responses of
White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate – White Springs
to the First Set of Interrogatories (Nos. 1 – 2)
of Progress Energy Florida, Inc.**

Served: May 12, 2005

GENERAL OBJECTIONS

1. White Springs objects to the Interrogatories to the extent that they seek information that is protected from disclosure by the attorney-client privilege, work product privilege, or other applicable privileges.
2. White Springs objects to the Interrogatories to the extent that they seek information that is not relevant to the matters at issue in this proceeding and thus are not reasonably calculated to lead to the discovery of admissible evidence in this proceeding.
3. White Springs objects to the Interrogatories to the extent that they require White Springs to supplement its responses in violation of Florida Rule of Civil Procedure 1.280(e).
4. White Springs objects to the Interrogatories to the extent that they seek information that is in the public domain or already in the possession of Progress Energy.
5. White Springs objects to the Interrogatories to the extent that they seek to impose obligations on White Springs in excess of the requirements of the Florida Rules of Civil Procedure and the Florida Public Service Commission procedural rules and requirements.
6. White Springs reserves the right to assert claims of privilege or to invoke protected status for confidential, proprietary information in the future to the extent that White Springs determines that such actions are necessary to protect White Springs's interests.
7. White Springs reserves the right to supplement and amend its General and Specific Objections to the Interrogatories at any time.

SPECIFIC OBJECTIONS

1. In addition to and without limiting or waiving the foregoing General Objections, White Springs also may raise Specific Objections as set forth in its responses, and reserves the right to raise other Specific Objections in responding to these and future Interrogatories.
2. All General Objections stated above apply to each Interrogatory regardless of whether a Specific Objection is raised or whether a General Objection is repeated or substantially incorporated in a Specific Objection.

**Progress Energy Florida, Inc.
Docket No. 041393-EI**

**Responses of
White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate – White Springs
to the First Set of Interrogatories (Nos. 1 – 2)
of Progress Energy Florida, Inc.**

Served: May 12, 2005

INTERROGATORIES

Interrogatory No. 1:

Please identify (including name, title and organization unit) each person (other than clerical personnel) who was involved in the preparation of White Springs' Petition for Hearing.

Response:

Subject to and without waiving the foregoing General Objections, White Springs responds as follows: The following individuals were involved in preparing the Petition for Hearing:

| <u>Name</u> | <u>Title</u> | <u>Organizational Unit</u> |
|--------------------|----------------------------------|-----------------------------------|
| Bryan D. Stone | Superintendent – E&I Maintenance | PCS Phosphate White Springs |
| Karin S. Torain | Legal Counsel | PCS Administration (USA) |
| Richard A. Zambo | Attorney (Outside Counsel) | Richard A. Zambo, P.A. |
| James M. Bushee | Attorney (Outside Counsel) | Sutherland Asbill & Brennan LLP |
| Daniel E. Frank | Attorney (Outside Counsel) | Sutherland Asbill & Brennan LLP |

Prepared by: Counsel

Date: May 19, 2005

Progress Energy Florida, Inc.
Docket No. 041393-EI

Responses of
White Springs Agricultural Chemicals, Inc. d/b/a PCS Phosphate – White Springs
to the First Set of Interrogatories (Nos. 1 – 2)
of Progress Energy Florida, Inc.

Served: May 12, 2005

Interrogatory No. 2:

Has White Springs been a member of the Florida Industrial Powers User Group (“FIPUG”) at anytime between January 1, 2004 to the present? If so, please indicate the dates of membership.

Specific Objections:

White Springs specifically objects to this interrogatory to the extent that it seeks information that is protected by attorney-client privilege.

White Springs further objects to this request on the grounds that it is irrelevant to the matters set for hearing in this proceeding and thus is not reasonably calculated to lead to the discovery of admissible evidence. Whether White Springs is a member of FIPUG is not an issue in this proceeding.

Response:

Subject to and without waiving the foregoing General and Specific Objections, White Springs responds as follows: Yes. White Springs has been a member of FIPUG from January 1, 2004 through the present.

Prepared by: Counsel

Date: May 19, 2005